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Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,
Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*

APPELLANTS' BRIEF.

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SUBJECT INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
Summary of Provisions of State Statute (ch. 218, Washington Sess. Laws, 1937, p. 1070)	5
Specification of Errors	10
Summary of Argument	11
Argument	13
POINT I. The allegations of the bill of complaint show that the amount in controversy exceeds $3,000; no answer was filed but the bill was dismissed on motion. Consequently it was error for the court below to dismiss the bill without affording appellants an opportunity to prove such of the allegations thereof as might be put in issue by an answer	13
POINT II. The allegations of the bill show that by the State Statute, the appellants are denied the equal protection of the laws and are deprived of the privileges and rights conferred upon citizens of the United States; thus the court below had jurisdiction of the cause regardless of the amount involved	25
POINT III. The Statute on its face is a clear violation of Article I, Section 8, Clause 8 of the Constitution of the United States	27

PAGE

POINT IV. The State Statute on its face clearly deprives appellants of their property without due process of law 31

POINT V. The Statute impairs obligations under existing contracts 33

POINT VI. The State Statute interferes with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights 36

POINT VII. In all other District Courts in which applications for interlocutory injunction were made to restrain enforcement of similar statutes, such injunctions were granted and the Courts held the allegations of the respective complaint sufficient to confer jurisdiction 37

Conclusion 38

Appendix (The Washington State Statute, ch. 218 Washington Sess. Laws, 1937, p. 1070) 39

TABLE OF CASES CITED.

American Tobacco Co. v. Werckmeister, 207 U. S. 284 28

F. A. D. Andrea, Inc. v. Radio Corp. of America, 88 F. (2d) 474 29

Bank of America v. Whitney Central Nat. Bank, 261 U. S. 171 32

Beatty v. Kurtz, 2 Pet. 566 18

Henry Bill Pub. Co. v. Smythe, 27 Fed. 914 29

Buck v. Case, 24 F. Supp. 541 1

Buck v. Elm Lodge, Inc., 83 F. (2d) 201 18

PAGE

Buck v. Hillsgrove Country Club, Inc., 17 F. Supp. 643 29
Buck v. Jewell-LaSalle Realty Co., 288 U. S. 191 29
Buck v. Keaton (Unreported, M. D. Tenn., Dec. 1, 1938, Docket #Eq. 728) 37, 38
Buck v. Landis (Unreported, N. D. Fla., Gainesville Div., April 5, 1938, Docket #Eq. 12), Appeal pending in this Court (#276) 38
Buck v. Swanson (Unreported, D. C. Neb., Nov. 13, 1937, Docket #Eq. 562) 37, 38

Caledonian Coal Co. v. Baker, 196 U. S. 432 32
Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182 28
Carl Fischer, Inc. v. Shannon (D. C. Mont., Helena Div. #1537) 38
Chipman Ltd. v. Jeffery Co., 251 U. S. 373 32
Cline v. Frink Dairy Co., 274 U. S. 445 33
Connally v. General Const. Co., 269 U. S. 385 33
Connolly v. Union Sewer Pipe Co., 184 U. S. 540 26
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727 32

Dobbins v. Los Angeles, 195 U. S. 223 27

Federal Radio Commission v. Nelson Bros. Co., 289 U. S. 266 7, 28
Fisher's Blend Station, Inc. v. Tax Commission, 297 U. S. 650 7

Gibbs v. Buck, No. 276 (Supreme Court, Oct. Term, 1938) 1, 38
Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57 28
Globe Newspaper Co. v. Walker, 210 U. S. 356 28
Grosjean v. American Press Co., 297 U. S. 233 24

Harrison v. St. Louis & San Francisco R. R., 232 U. S. 318 26, 32
Haynes v. Fraternal Aid Union, 34 F. (2d) 305 19
Heiner v. Donnan, 285 U. S. 312 33
Herbert v. Shanley, 242 U. S. 591 27

James v. Campbell, 104 U. S. 356 28
Jennings v. U. S. Fidelity & G. Co., 299 U. S. 216 28

PAGE

KVOS Inc. v. Associated Press, 299 U. S. 269 ..... 19, 21-22

Lithograph Co. v. Sarony, 111 U. S. 53 28
Local Union No. 497 v. Joplin Ry. Co., 287 Fed. 473 ..... 18, 19

McFarland v. American Sugar Co., 241 U. S. 79 27
Manley v. Georgia, 279 U. S. 1 33
Minnesota C. M. Assn. v. Benn, 261 U. S. 140 32
Morrison v. California, 291 U. S. 82 33

Napier v. Atlantic Coast Line Ry. Co., 272 U. S. 605 28

Old Wayne Life Assn. v. McDonough, 204 U. S. 8 32

Paul v. Virginia, 8 Wall. 168 26
People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79 32
Polk Co. v. Glover, 83 L. Ed. 73 ..... 13, 14-15

Raich v. Truax, 219 Fed. 273, aff'd 239 U. S. 33 25

Shields v. Thomas, 17 How. 3 19
A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233 33
Smith v. Swormstedt, 16 How. 288 18
Society of European S. A. and C., Inc. v. New York Statler Hotel, Inc., 19 F. Supp. 1 29

Terral v. Burke Construction Co., 257 U. S. 529 26
Texas & Pac. Ry. v. Gentry, 163 U. S. 353 19
Troy Bank v. Whitehead & Co., 222 U. S. 39, 40 19

United States v. Bell Telephone Co., 167 U. S. 224 28
United States v. Cohen Grocery Co., 255 U. S. 81 33
United States v. Dubilier Condenser Corp., 289 U. S. 178 28
United States v. Hill, 248 U. S. 420 28

Worthen Co. v. Kavanaugh, 295 U. S. 56 35

CONSTITUTION OF THE UNITED STATES.

	PAGE
Article 1, Section 8, Clause 8	5, 10, 12, 25, 27
Article 1, Section 10	10, 35
Article 3, Section 2	10
Article 4, Section 2	10
Article 6	10
Fourteenth Amendment, Section 1	10

STATUTES AND RULES OF COURT.

Act of Mar. 4, 1909, c. 320, 35 Stat. 1075; 17 U. S. C., as amended (Copyright Act)	2, 5, 25, 30, 36
Section 1	27
Section 8	17
Sections 9, 12, 18, 42, 43, 44, 45, 46, 56, 57	30
Act of Feb. 13, 1925, c. 229, §1; 43 Stat. 938; 28 U. S. C. §345	2
Judicial Code §24 (14); Act of Mar. 3, 1911, c. 231, §24, par. 14, 36 Stat. 1092; 28 U. S. C. §41 (14)	25
Judicial Code §266; Act of Feb. 13, 1925, c. 229, §1; 43 Stat. 938; 28 U. S. C. §380	2
Equity Rule 29	13
Equity Rules 37, 38	18
Rule 23 of Rules of Civil Procedure	18

STATE LAWS.

Florida Laws of 1937, 1 Gen. Laws, p. 204	37
Montana Laws of 1937, c. 90	37
Nebraska Laws of 1937, Session Laws, p. 488	37
Tennessee Laws of 1937, c. 212	37
Washington Laws of 1937, c. 218 (Session Laws, 1937, pp. 1070-1085)	2, 5

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APPELLANTS' BRIEF.

Opinion Below.

The opinion of the three-judge court below (R. 248) is reported as *Buck* v. *Case*, 24 F. Supp. 541 (June 28, 1938).

Jurisdiction.

This Court noted probable jurisdiction on October 10, 1938, and assigned the cause for argument immediately following argument of the appeal in *Gibbs* v. *Buck*, No. 276.

The statement filed under Rule 12 shows that this is an appeal under Sections 266 and 238 of the Judicial Code (U. S. C., Tit. 28, Secs. 380, 345) from a decision of a three-judge court denying appellants' motion for an interlocutory injunction to restrain enforcement of a State Statute and dismissing the bill of complaint for lack of jurisdiction.

Statutes Involved.

The statute of the State of Washington, the validity of which is involved is the Act of March 19, 1937, being Chapter 218, Laws of Washington 1937 (Session Laws, 1937, pp. 1070-1085). A copy of the statute is annexed hereto as an Appendix (p. 39), and will be referred to as the "State Statute". Its provisions are summarized below. This case also involves the Federal Copyright Act, (35 Stat. L. 1075, Tit. 17, U. S. C., as amended), which is printed in Copyright Office Bulletin No. 14. Copies of this Bulletin will be handed to the Court on the argument.

Statement of the Case.

This action was brought by several owners of copyrighted musical compositions in their individual capacities as well as in their joint capacities as members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society") to enjoin enforcement of the State Statute on the ground that such Statute is in conflict with the Federal Constitution and Treaties between the United States and foreign countries (R. 1-32).

The appellant Society is an unincorporated association consisting of 1,000 composer and author members and 123 publisher members (R. 1-2, 14-15). All members of the

Society grant it for limited periods of time the exclusive right to license the public performance for profit of their copyrighted musical compositions (R. 14-15). The Society in turn issues licenses to users on the joint behalf of all its members (R. 15-16). It has for many years granted such licenses to commercial users of music in the State of Washington, of which licenses 528 were valid and subsisting when the State Statute was enacted (R. 18). Typical license agreements are annexed to the complaint as Exhibits "F", "G" and "H" (R. 18-19, 69, 72, 73).

The verified bill of complaint (R. 1), motion for interlocutory injunction (R. 78) and supporting affidavits (R. 79-164) were filed May 28, 1937 (R. 335). Appellees did not file answers, but did file motions to dismiss (R. 184, 221, 240). The motion for interlocutory injunction and the motions to dismiss were heard before Hon. BERT EMORY HANEY, Circuit Judge, and Hon. JOHN C. BOWEN and Hon. EDWARD E. CUSHMAN, District Judges, on June 29, 1937 (R. 241).

Almost a year thereafter, on May 9, 1938, an opinion was filed by Judge CUSHMAN *dismissing the bill of complaint* and denying the interlocutory injunction on the ground "that there is no competent evidence showing that the matter in controversy exceeds, exclusive of interest and costs, $3,000.00" (R. 248, 276). The court held that the affidavits were incompetent as evidence because of the motions to dismiss, and that in any event the affidavits could not be considered because the court would not "be warranted in accepting, without opportunity for cross-examination, the statement of an owner as to the value of his property unless it was a statement against interest" (R. 276).

At the foot of its opinion, the Court made provision for "additional orders or rulings" if desired (R. 276).

Believing that the purpose of this provision was to give appellants an opportunity to present oral proof in support of their averments as to jurisdictional amount, they applied for an order permitting them to give such testimony in open court or by deposition (R. 277-283). As a manifestation of their good faith appellants, pursuant to an order to show cause (R. 284), produced in open court in Tacoma, Washington, three witnesses who journeyed from New York City, and one from Los Angeles, including the president, chairman of the administration committee and a director of the Society to prove the averments in the bill and affidavits, and to give appellees' counsel ample opportunity for cross-examination (R. 286-292, 303).

The learned court below refused to permit those witnesses to testify and thereupon dismissed the bill and denied the interlocutory injunction for failure to show the requisite jurisdictional amount (R. 303-306, 325-6).

After this Court noted probable jurisdiction, the appellee G. W. Hamilton, Attorney General of the State of Washington, moved to dismiss the appeal on the ground that the Governor of the State of Washington and certain state officials who had not been made parties were indispensable parties, and on the further ground that service of the papers on appeal on Alfred J. Schweppe, Esq., as attorney for the Attorney General was not service upon the Attorney General. This motion was granted only to the extent of dismissing the appeal as against certain appellees, who died or resigned, namely Ernest N. Hutchinson, John D. Evans and Sam M. Driver. In all other respects the motion was denied (November 7, 1938, 83 L. Ed. 89).

Summary of Provisions of State Statute.

(CH. 218, WASHINGTON SESSION LAWS, 1937, P. 1070.)

The State Statute directly affects appellants' copyrighted works in the following way:

1. Performance of copyrighted works without the consent of the owner is made unlawful (Sec. 2, R. 61).[1]

2. The combination within or without the State by two or more persons owning copyrights for the purpose of fixing prices for the use of their copyrighted works or for the purpose of collecting copyright royalties, or of issuing blanket licenses in the State for the right to commercially use their separate copyrighted works is unlawful (Sec. 3, R. 61-62).

3. Notwithstanding the provision making it unlawful for two or more persons to combine as aforesaid, such persons may combine if they issue licenses "on rates assessed on a per piece system of usage", provided that rates assessed on such per piece basis be not in excess of those charged by *any* group in any other State (Sec. 3, R. 62).[2]

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[1]This section merely does lip service to the Federal Copyright Law (35 Stat. L. 1075, Title 17, U. S. C., as amended). In the first place, the enforcement of that law is delegated to the Federal Government exclusively under Article I, Section 8, Clause 8 of the Federal Constitution. In the second place, the subsequent provisions of the State Statute authorizing performances of copyrighted works without the consent of the copyright owners, are in direct conflict with the Federal Copyright Act.

[2]It is appellants' contention that this section is a direct interference with their rights as copyright owners to determine the prices and the conditions under which their works may be performed; that it is unworkable and in effect, confiscates their copyrights as well as nullifies existing contracts between the appellant Society and its members, and between said Society and 528 commercial users of music in the State of Washington (R. 4-12, 15-17, 20-30).

4. A single "sale" of the right of public performance for profit *within or without the State*, bars all copyright owners *whether members of a combination or not*, from thereafter restricting the use of their copyrighted works (Sec. 3, R. 62).[3]

5. All copyright owners who combine "*whether for a lawful purpose or otherwise*" must file annually under oath with the Secretary of State of the State of Washington two copies of a complete list of all their coprighted works, "whether musical or dramatic or of any other classification"; stating the date each separate work was copyrighted; the name of the author, the date of any assignment of the work or of any interest therein, the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work (Sec. 4, R. 62). The alleged purpose of this section is that all users in the State of Washington may know the rights and titles to the copyrighted works claimed by such persons, and to enable such users to avoid using copyrighted compositions (Sec. 5, R. 62-3).[4]

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[3]Since there can be no right to issue licenses unless the licensor has the right to restrict others from using the copyrighted work, this clause bars appellants from issuing licenses in the State of Washington. All the members of the Society, including appellants, have "sold" to the Society the exclusive right to the use of their copyrighted works in public performance for profit until December 31, 1940 (R. 15, Exs. "B", "C", R. 34, 38). Under the State Statute, they are therefore barred from further restricting such performances.

[4]The Copyright Law itself amply safeguards all users against innocent infringement as explained below in Point III of this brief (pp. 27-31).

A very likely reason for the requirement of this list is that it would make it simple for the State of Washington to execute an involuntary assignment to itself, under Section 9 of the Statute, of all of appellants' copyrighted works without going to the necessary expense of examining the copyright entries in the office of the Register of Copyrights in Washington, D. C.

6. These lists must be filed even if the copyright owners affected are not doing business in the State of Washington so long as renditions of their copyrighted works *have been* or are used commercially in Washington whether originating from a point within the State or from without, so long as any rendition thereof may be heard within the State (Sec. 6, R. 63).[5]

7. The production, creation and commercial use of copyrighted music within the State of Washington even though originating from a point without the State, is declared to be affected by the public interest of Washington (Sec. 7, R. 63).

8. Copyright owners who fall within the condemnation of the statute are denied the right to sue in the Federal courts, in that suits for infringement of copyright or threats of such suits are prohibited; the copyrights of offenders are given a fictitious legal *situs* within the State of Washington (Sec. 5, R. 63-4). If such persons issue licenses "either from within or from without the State", they are deemed to be doing business within the State of Washington (Sec. 8, R. 64).

9. Detecting infringements and notifying users of such infringements are referred to in the Statute as "the business of spying upon and the warning of users" (Sec. 8, R. 64). Such conduct on the part of copyright owners "in addition to the presence within the State of such persons, * * * shall be

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[5]All appellants' copyrighted works have been and are now being publicly performed for profit within the State (R. 23, 27-28), and there is no way of preventing performances of their works by means of radio broadcasting from crossing the borders of the State of Washington and being heard within that State (R. 23-4). In fact, the interstate nature of such broadcasts is the very foundation for the Federal Communications Act. *cf. Fisher's Blend Station, Inc.* v. *Tax Commission*, 297 U. S. 650 (1936); *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933).

conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this State" (Sec. 8, R. 64).

10. If any agent, attorney, representative or investigator of any such copyright owner uses any privileges available to a citizen of the State of Washington, the copyright owner is deemed to have accepted all the provisions of the Statute; his licensees are deemed aiders and abettors, and he is deemed to have appointed the Secretary of State of the State of Washington as his attorney upon whom process may be served (Sec. 8, R. 64-5).

11. If any attempt is made by such copyright owners to evade or render ineffectual the enforcement of the Statute, injunction proceedings will be commenced against them in the State courts by service upon the Secretary of State, and a receiver will be appointed of all their copyrighted works and property, tangible or intangible, regardless of the **actual** *situs* of their property. The receiver is directed to seize the copyrighted works of all such owners "including all of the rights to suits for infringement and damages in both State and Federal courts, and all choses of action and all sums due on contracts and licenses" (Sec. 9, R. 65-6).[6]

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[6]In other words, if appellants should decide that in view of the cost of complying with the Statute (which cost will exceed $300,000) (R. 22) as contrasted with the relatively small amount secured from the licensing of their works in the State of Washington ($60,000 annually) (R. 21-2), and should prefer to abandon the issuing of licenses and to treat all persons performing their works as infringers: they will be unable to sue for infringement in the Federal Courts because all right to sue for infringement will have been taken over by the receiver appointed in a manner which offends the constitutional provisions of due process and equal protection of the laws.

12. Upon any attempt of such copyright owners to withdraw their copyrighted works from the State, such receiver must compile a list of all their copyrighted works which have been used in the State (which include practically all of their works); and the court must convene a so-called Anti-Monopoly Board, which board must determine and fix a rate that the receiver shall charge for the single and separate public performance for profit of each copyrighted work of such copyright owners "on a per piece system * * * on a basis of so much money per each time a piece of music is played or used in a public performance for profit" (Sec. 9, R. 66).

13. Failure to appear in said court proceedings for a period of one year, results in the escheat and forfeiture to the State of Washington of all their copyrighted works, and the execution of an involuntary assignment of all the legal and equitable titles to all of the copyrighted works to the State of Washington to be filed with the Register of copyrights at Washington, D. C. (Sec. 9, R. 66-7).

14. If appellants (who are all non-residents [R. 3]), should appear in the State courts for the purpose of contesting the validity of the constructive service upon them in the form outlined in the Statute, such special appearance shall "be deemed as a general appearance even though the process may have been insufficient" (Sec. 10, R. 67-8).[7]

15. The penalties against any offending copyright owners, as well as against any of their licensees, agents,

[7]Strangely enough this section has a proviso that it shall not be construed as denying due process of law (Sec. 10, R. 68).

representatives, investigators and attorneys is a fine not exceeding $500 or imprisonment for not more than six months or both (Sec. 11, R. 68).[8]

Specification of Errors.

The court below erred in dismissing the bill of complaint (Assignment 1, R. 328); in denying appellants' motion for interlocutory injunction (Assignments 2, 3, 16, R. 328, 332); in refusing to hold that the allegations of the complaint were sufficient to support its jurisdiction as a Federal Court (Assignments 4, 5, R. 328-9); in denying to appellants an opportunity to present oral testimony to support the allegations of the bill and moving affidavits (Assignments 6, 7, R. 329-30); in refusing to hold that the State Statute is in conflict with the Copyright Clause (Art. 1, Sec. 8, Cl. 8) of the Federal Constitution (Assignments 9, 10, 14, 17, R. 330, 331-2), the Contract Clause (Art. 1, Sec. 10), (Assignments 5(j), R. 329; 10(c), R. 330-1), treaties made pursuant to Article 3, Section 2 which are the supreme law of the land under Article 6 of the Federal Constitution (Assignments 10(f), 14, R. 331-2), the Privileges and Immunities Clause (Art. 4, Sec. 2) (Assignments 14, 17, R. 331-3), the Privileges and Immunities Clause, the Liberty of Contract Clause, and Equal Protection Clause of Section 1 of the Fourteenth Amendment (Assignments 9, R. 330; 10(b), (c), (d), (e), R. 330-1; 11, 13, 14, R. 331-2; 17, R. 332-3).

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[8]The remaining sections of the Statute provide that if any portion of the Act is declared unconstitutional, such holding shall not affect the validity of the balance of the Statute (Sec. 12, R. 68); and that where more than one injunction suit is instituted in different counties, orders may be issued against the defendants in each of the counties, but if there is a receivership and the defendants are the same the actions are to be consolidated in one county (Sec. 13, R. 68).

Summary of Argument.

1. Appellants' bill, which challenged the validity of a statute of the State of Washington upon the ground that it was in conflict with the Federal Constitution in the respects hereinafter mentioned, and its motion for a temporary injunction against the enforcement of the statute and the imposition of the penalties therein provided, were dismissed by the court below upon the ground that the allegations of the bill did not show that the requisite jurisdictional amount of $3,000 was involved. The case was not before the court on final hearing and no answer had been filed. Appellants were not permitted to offer oral evidence to establish the fact that the jurisdictional amount was involved, the court having previously held that it could not consider affidavits directed to that question.

2. The court below erred (a) in holding that the bill did not allege facts showing that the jurisdictional amount was in controversy, and (b) in failing to recognize that the bill alleged facts which made it unnecessary that the amount in controversy exceed $3,000.

The first error is established because the bill shows that the State Statute destroys contracts which the appellants have that produce $60,000 annually; that to attempt to comply with one of the provisions of the State Statute would cost the appellants $350,000 annually; that a failure to comply with the statute and the enforcement of one of the penalties therein provided would cause a loss to the appellants severally of sums ranging from $100,000 to $1,000,000; that a compliance with the statute would cost four individual appellants alone in excess of $25,000 each, and the remaining individual appellants in excess of ~~$5,000~~ 10,000 each.

The second error arises from the failure of the court to recognize that the State Statute deprives appellants of certain rights and privileges of citizens of the United States and the equal protection of the law, and that in such a case the jurisdictional amount of $3,000 is not necessary.

3. The State Statute is invalid because (a) it violates Art. 1, §8, Clause 8 of the Constitution in that it attempts to regulate the rights of owners of copyrights; (b) it deprives appellants of their property without due process of law; (c) it impairs obligations of existing contracts; (d) it deprives appellants of rights and privileges of citizens of the United States and equal protection of the law; (e) it interferes with appellants' liberty of contract in the State of Washington and elsewhere; (f) it interferes with treaties between the United States and foreign countries.

4. Decisions of three other District Courts have enjoined similar statutes and in doing so necessarily held (a) that complaints containing similar allegations did show the necessary jurisdictional amount, (b) that there was grave doubt as to the constitutionality of such statutes, and (c) that the plaintiffs in those cases (appellants in the case at bar) would suffer irreparable injury if interlocutory relief were denied.

POINT I.

The allegations of the bill of complaint show that the amount in controversy exceeds $3,000; no answer was filed but the bill was dismissed on motion. Consequently it was error for the court below to dismiss the bill without affording appellants an opportunity to prove such of the allegations thereof as might be put in issue by an answer.

As previously stated, no answer was filed to the bill of complaint. Appellees moved to dismiss the bill on several grounds, among which was that the bill did not set forth facts showing that the value of the amount in controversy equalled or exceeded $3,000. The bill was dismissed by the court below on that ground and also because "the record" did not show that the value of the matter in controversy, exclusive of interest and costs, exceeded $3,000 (R. 276, 305, 326); and this notwithstanding the Court considered the affidavits *incompetent* as evidence to prove value, and at the same time denied appellants the opportunity to substitute *testimony* to be taken in open court. The dismissal of the bill was apparently based on Equity Rule 29.

Insofar as the dismissal of the bill in the case at bar was based upon the alleged lack of evidence to show that the jurisdictional amount is in controversy and that the allegations of the *bill* in respect to that question are sufficient, the very recent decision of this Court in *Polk Co.* v. *Glover*, decided November 7, 1938 (83 L. Ed. 73) is directly in point. There a Florida statute compelled canners of citrus fruits to emboss upon the container the name of the state in which the fruit was produced, and prohibited use of the name "Florida" for canned fruits or juices produced elsewhere. The complaint alleged that plaintiffs were canners of citrus fruits grown in Florida; that they had no assurance from any enforcement officer that failure to comply with the statute would not result in criminal prosecution or in con-

fiscation of products packed; that the cost of conforming labels on hand to the requirements of the statute would exceed $3,000; that the tins on hand which could not be used lawfully were worth in excess of $3,000; that the refusal of distributors to handle cans embossed in conformity with the statute would result in loss in excess of $3,000; and that enforcement of the statute would inflict immediate and irreparable injury. Answers were filed, and a motion to dismiss made for failure to state facts sufficient to constitute a cause of action. Plaintiffs moved for interlocutory injunction, and defendants filed affidavits in opposition. The District Court granted the motion to dismiss and denied interlocutory relief on the ground that no sufficient facts had been shown by affidavits or otherwise to overcome the legislative finding in the preamble of the statute that its passage was necessitated by a fraudulent practice of labelling fruits grown elsewhere as grown in Florida, thus injuring Florida producers and canners; that the statute was within the scope of the police power; that there was no showing that the cans on hand could not be used for some other purpose, and that there was not sufficient proof that distributors would refuse to handle cans embossed in the manner required by the statute. 22 F. Supp. 575.

In reversing the decree, and remanding the cause this Court said (*per curiam*, 83 L. Ed. at p. 75):

> "We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence pro-

duced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice. The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 211-213, 79 L. ed. 281, 289, 290, 55 S. Ct. 187, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings."

In the case at bar the complaint alleges that the appellant Society was formed in 1914 for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members, and has continuously so functioned since that date (R. 13-14); that one of its functions is to detect infringements of the right of public performance for profit of its members and to institute suits for such infringements (R. 14). Prior to the organization of the Society none of the appellants or their predecessors in interest received any compensation for the public performance for profit of their respective copyrighted musical compositions because users of such music throughout the country refused to recognize appellants' rights, and publicly performed for their private profit the musical compositions owned, written and com-

posed by appellants and their predecessors in interest without payment of any royalties (R. 12). Appellants and others similarly situated were unable individually to enforce their exclusive rights in the public performance of these compositions for profit; they lacked the necessary means to employ investigators throughout the country to detect such infringements which were fugitive, fleeting and ephemeral, the users making no record of such performances (R. 12-13); they lacked means of employing lawyers throughout the country to bring suit against such infringers (R. 13). There was no method by which users who were willing to obtain licenses could do so because they required ready access to a great number of musical compositions for performance each evening at a moment's notice (R. 13); it was impossible for the user to get in touch with the individual owners of the particular compositions, many such owners being scattered throughout the world (R. 13).

When appellants *individually* attempted to enforce their rights they were resisted by economically powerful organizations of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors who offered to defend all infringers even though they were not members of the respective associations (R. 13).

These economic conditions made it necessary for a group of America's leading composers, authors and publishers to form the Society in 1914 (R. 13). Groups of users thereafter continued their organized effort to destroy these rights, augmented and fortified by powerful groups of radio broadcasters with the birth of that industry in 1922 (R. 14). The State Statute was enacted as part of a concerted plan on the part of these users to destroy the Society by legislation prohibiting its operations in the several states and nullifying the rights granted to its members under the United States Copyright Act (R. 14, 17).

While attempting to destroy the organization which enables copyright owners to deal *collectively* with users of

music, the latter have uniformly objected to dealing with *individual* copyright owners for the licensing of the public performance for profit of particular copyrighted musical compositions (R. 15-16). They have asserted that such individual licensing would involve a great amount of bookkeeping, clerical hire and expense, all of which is avoided by the Society's system of blanket licensing (R. 16). The purpose of the users (which this Statute attempts to achieve) is to restore the situation existing prior to the organization of the Society in 1914, when it was impossible as a practical matter to secure protection of the right of public performance for profit against unauthorized uses and wilful piracy (R. 17, 25).

The 123 publisher members, and 1000 writer and composer members of the Society have all entered into contracts with the Society which do not expire until December 31, 1940, these contracts being renewals of previous agreements for five-year terms (R. 14-15). By these contracts all members assign to the Society the exclusive right of public performance for profit in their respective copyrighted musical compositions for the duration of the contracts (R. 15). All contracts are identical, typical ones being annexed to the complaint as Exhibits "B" and "C" (R. 34, 38). The Society also has mutual working arrangements with similar foreign societies having 44,000 members in almost every civilized country of the world, whereby each society is granted the exclusive right to license in its own territory the works copyrighted by the respective members of foreign societies (R. 19-20). Such reciprocal agreements are made possible by copyright treaties between the United States and the respective foreign countries, and by the provisions of Section 8 of the Copyright Act as well as by Presidential proclamations (Tit. 17, U. S. C.) (R. 19).

The Society, in turn, on the joint behalf of all its members and on behalf of the respective foreign societies, licenses users under a form of blanket license which permits the licensee to play any and all compositions of all members

of the Society as well as compositions owned by members of the foreign societies, at any time without the necessity of securing a separate license in advance for each number performed (R. 18-19; Exs. "F", "G" and "H", R. 69, 72, 73).

(a) The complaint shows that joint rights of appellants which are destroyed by the State Statute have a value far in excess of $3,000, and that the cost of attempting to comply with the statute in issuing licenses jointly will be far in excess of $3,000.

This action is brought on behalf of all members of appellant Society (an unincorporated association) to redress an injury to property rights in which all such members have a joint and common interest (R. 1-2, 14-16; Exs. "B", "C" and "D", R. 34, 38, 41).[9]

The matter in controversy between the appellant Society and the appellees exceeds the value of $3,000 as shown by the following allegations of the bill:

(1) The Statute interferes with and destroys 528 contracts between the Society and users in Washington, from whom the Society, on behalf of all its members jointly, has received and would continue to receive annually, but for the Statute, in excess of $60,000, which sum has been lost to it (R. 18-22; Exs. "F", "G" and "H", R. 69, 72, 73). The Society has not received any payments since the effective date of the Statute—a period of more than one year (R. 23-4, 27-30).

(2) It would cost the Society in excess of $300,000 to compile a list containing the information required by the Statute as to the copyrights of its own members, and interests therein, and an additional $50,000 as to the copy-

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[9] Equity Rules 37, 38; Rule 23 of Federal Rules of Civil Procedure; *Smith* v. *Swormstedt*, 16 How. 288, 302-3; *Beatty* v. *Kurtz*, 2 Pet. 566, 584-5; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Buck* v. *Elm Lodge*, 83 F. (2d) 201 (C. C. A. 2).

rights of members of foreign societies, whose copyrights the Society licenses under reciprocal contracts (R. 20-22).[10]

The amount in controversy is determined by the *joint* interest of all members of the Society since the rights affected by the Statute are joint. In other words, a minimum injury of $60,000 annually to their joint interests is involved if appellants *fail* to comply with the Statute (R. 18-22); and a minimum cost of $350,000 is involved which appellants must spend *jointly* if they attempt to comply with the Statute (R. 20-22). Since appellants' interest in copyrighted compositions of which the exclusive performing rights have been assigned to the Society (and which the Society in turn has the right to license and has licensed to others on behalf of all its members) is common and undivided, it is enough that their interests *collectively* equal the jurisdictional amount. *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40; *Local Union No. 497* v. *Joplin Ry. Co.*, 287 Fed. 473, 475 (C. C. A. 8); *Haynes* v. *Fraternal Aid Union*, 34 F. (2d) 305, 308 (D. C. Kans.); See also *Shields* v. *Thomas*, 17 How. 3, 4. The value of these contracts is the amount involved. *Texas & Pac. Ry.* v. *Gentry*, 163 U. S. 353, 361.

The court below held that under the doctrine of *KVOS Inc.* v. *Associated Press*, 299 U. S. 269, the court could not

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[10]In addition to the allegations of the complaint, the affidavits submitted in support of the motion for interlocutory injunction show: (1) If the Society fails to comply with the Statute, all its contracts and interests in copyrights throughout the United States will be seized and escheated and forfeited to the State of Washington. It will lose $3,200,000 as its annual license fees from radio broadcasting stations alone (R. 108). (2) It would cost the Society annually in excess of $3,000,000 to attempt to conform its operations throughout the United States to the requirements of the State Statute—an undertaking so prohibitive as to either force the Society to disband or to make license fees so absolutely exorbitant as to make it impossible for the establishment to operate (R. 117). Unless the Society changes its operations outside the State of Washington to conform with the Statute's requirements, it will obviously be guilty of violating the Statute.

consider the *joint* claims of the members of the Society in determining the jurisdictional amount (R. 273-4). The *KVOS* case, however, bears no analogy to the case at bar. There, the Associated Press, a *corporation,* brought an action to restrain a radio broadcasting station from appropriating news gathered by the Associated Press or its members. The members of the Associated Press were owners of newspapers who divided among themselves the cost of the corporation's operations. The injury complained of, was one suffered by three stockholders of the plaintiff who operated newspapers in the vicinity of defendant's station. *Those three members were not parties to the suit.* The means used by Station KVOS consisted in procuring copies of papers published by those three members and broadcasting certain items published therein, whether the news was gathered by the staff of the three papers or received by them from the Associated Press. The complaint was attacked on the ground of non-joinder of parties plaintiff, since the owners of the three papers involved were not made parties, and on the ground that the jurisdictional amount of $3,000. was not involved. The complaint failed to allege the amount received by plaintiff from the three newspapers located in the area reached by the defendant radio station, nor was there any allegation of the jurisdictional amount involved other than the general allegation that the damage to which plaintiff is being subjected is in excess of $3,000, and that the cost of plaintiff's transactions annually, amounting to many millions of dollars was equitably divided among its members. The Court held that there was no sufficient averment of any injury to the plaintiff in excess of $3,000.

There was an allegation that the payments made by newspapers for the news sold to them by plaintiff in the territory served by Station KVOS was upwards of $8,000 per month which was being imperilled by the defendant's

acts, but there was no averment that the members in that territory threatened to withdraw from the plaintiff, or that such members or the plaintiff were injured in any particular sum. Obviously, if the members did not withdraw, there would be no diminution of dues, and the Associated Press would not suffer financially. Moreover, it appeared from the complaint that the plaintiff could not possibly be injured by the defendant's acts, inasmuch as it acted only as a conduit for the clearance of news between all its members. The cost of plaintiff's operation was prorated equitably among its members. The plaintiff did not sell anything or receive anything. Its only transactions were with its members, and the injury to any of the newspapers owned by its members was an injury to such members and not to the plaintiff.

The appellant Society, on the other hand, on the *joint* behalf of *all* its members owns outright the performing rights in musical compositions (Exhibits "B" and "C", R. 34, 38). It licenses these rights and collects moneys therefor. These moneys, as well as the rights belong to the members jointly. Some of these moneys are never distributed but are set aside in a reserve fund (Articles of Association, Ex. "D", R. 41, 58); other moneys are set aside in a relief fund (Ex. "D", R. 58). In short, the Society on behalf of its members has a definite property right which has been injured by the enactment of the Statute.

In the *KVOS* case, this Court said at page 277:

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. *No facts are pleaded which tend to show the value of that right.*" (Italics ours.)

Referring to the allegation that the newspapers in the territory involved in the *KVOS* case paid upwards of $8,000 per month to the Associated Press and that that payment was "being imperilled and jeopardized"; this Court said at page 278:

> "This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The association cannot therefore lose the $8,000 in question. If the three newspapers in the affected territory cease to pay the sum, they will save it, not lose it, and as to any other damage they may suffer from petitioner's competition, the affiant is silent. Assuming, without deciding, that in the circumstances disclosed the respondent has standing to maintain a suit to redress or prevent damage *caused its members* by petitioner's conduct, the allegation of possible damage to them is wholly inadequate, because *the asserted danger of loss of members is a mere conclusion unsupported by even a suggestion that withdrawal has been threatened by any newspaper, and no intimation is given of the character or extent of the damage they would suffer by such withdrawal.* The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill." (Italics ours.)

In the case at bar, the injury to the collective rights of appellants is undisputed, certain and inevitable. The Society *must* abandon all its contracts with licensees in the State of Washington because it cannot operate lawfully under the Statute unless it issues licenses on a *per piece* basis. The present licenses are *blanket* licenses. Such licenses give all licensees the right to publicly perform for profit any and all of the works of all the members of the Society and the members of the foreign societies affiliated

with the Society without allocating the payments for each use of each work. Under the State Statute a price would have to be fixed for each use of each work, and separate accountings would have to be made to each member therefor. The continuance of the present blanket contracts is not only impossible but is expressly made unlawful.

The allegations as to the value of the right to be protected and the right to be free of the regulations by the Statute, as well as the losses which must follow the enforcement of the rules prescribed by the Statute are clear, explicit and definite.

Quite irrespective of the damage which the State Statute will cause the Society, as the representative of all of the members jointly, it will be recalled that ten individuals are parties plaintiff and the bill alleges that the State Statute will cause each of these individuals damage in excess of $3,000, the amount of damage being given in each individual case as will be presently shown.

(b) The matter in controversy between each individual appellant and appellees exceeds the value of $3,000 as shown by the following:

(1) They will lose the amounts which they now receive from the Society, since the Statute compels them to surrender their membership. The contracts of each do not expire until December 31, 1940. On the basis of past annual receipts in excess of $50,000 each (R. 29), appellants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., will each suffer a net loss in excess of $200,000. Appellants Buck, Nevin, Taylor, Speaks, Hill, Sousa and Bartlett will each lose in excess of $12,000, each having received in excess of $5,000 annually in the past (R. 29).

(2) Compliance with the requirements of the Statute would cost each of appellants, Carl Fischer, Inc., G.

Schirmer, Inc., and Irving Berlin, Inc., annually in excess of $25,000 for investigators, lawyers, clerical help and other expenses in attempting to file the requisite lists (R. 7-8); and it would cost the other individual appellants in excess of $10,000 each to do so (R. 17).

(3) If appellants fail to comply with the Statute, each of them will suffer the forfeiture of all copyrights and interest therein to the State of Washington in a suit wherein process will be served on a fictitious "agent", based on fictitious definitions of "doing business" and of "situs" of copyrights. The value of copyrights owned by appellants Carl Fischer, Inc., G. Schirmer, Inc., and Irving Berlin, Inc., is in excess of $1,000,000 each (Compl., par. 8, R. 7-8). Each of the other appellants has interests in copyrights including renewal rights valued in excess of $100,000, all of which will be confiscated (Compl., pars. 11, 12, 13 and 14, R. 9-12). In addition they will be fined not exceeding $500 and/or imprisoned not more than six months for each offense resulting in penalties of $250,000 against each appellant who attempts to assert his constitutional rights against the 528 users in Washington.

The individual appellants have neither the resources, funds, organization nor ability to protect their copyrighted musical works against infringement and if they are deprived of the right to combine, they will have to surrender and forfeit the right of public performance for profit which is given to them under their respective copyrights (Compl., par. 21, R. 16-17).

It seems clear that facts showing the necessary jurisdictional amount are amply alleged as to each appellant individually, as well as jointly in his capacity as a member of the Society. In any event it is sufficient if the necessary jurisdictional amount be shown as to any one appellant. (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 241-2.)

POINT II.

The allegations of the bill show that by the State Statute, the appellants are denied the equal protection of the laws and are deprived of the privileges and rights conferred upon citizens of the United States; thus the court below had jurisdiction of the cause regardless of the amount involved.

Where a claim is made that a citizen is being deprived of certain rights and privileges of citizens of the United States or that he is denied equal protection of the laws, the Federal Courts have jurisdiction regardless of the value of the matter in controversy. (Jud. Code, Sec. 24, subd. 14 [U. S. C. Tit. 28, Sec. 41]; *Raich* v. *Truax*, 219 Fed. 273, 283, aff'd. 239 U. S. 33 [1915].)

All the individual appellants are citizens of the United States and all reside in the State of New York, except Mrs. Ethelbert Nevin who resides in the State of Maine (R. 3).

The complaint alleges that the State Statute deprives appellants of certain rights, privileges and immunities secured to them by the Constitution and Laws of the United States, to wit, the right to have and enjoy the exclusive rights under certain copyrights granted to them respectively under Article 1, Section 8 of the Constitution of the United States and the Copyright Act of 1909, as amended (35 Stat. L. 1075; U. S. Code, Tit. 17), and the right to exercise these rights freely in the State of Washington, and denies to them in the exercise of these rights the equal protection of the laws; that the State Statute grants special privileges to users of copyrighted music in the State of Washington at the expense and in disregard of appellants' rights; and that it takes their property without just compensation for a private purpose (R. 4-7).

The Statute on its face deprives appellants of the right to act collectively. Yet the individual appellants have neither the resources, funds, organization or ability to protect their respective copyrighted musical works against infringement by unauthorized public performances for profit within the State of Washington, and do not have the means of setting up an agency in the State of Washington such as this Statute would require if they were to attempt to exercise their rights individually in that State (R. 16-17).

The Statute on its face prohibits appellants from exercising any privileges of citizens of the State of Washington, including the right to use the public highways, except at the expense of sacrificing certain interests in their respective copyrights, and it denies them the right to license public performances outside of the State of Washington by means of radio broadcasting, except at the expense of a loss of their rights within the State of Washington and ultimately a confiscation of all their copyrights if any performance of their copyrighted works has been or may be heard within the State of Washington, having been broadcast from stations without the State.

The penalties imposed on appellants by the Statute result in denying them equal protection of the laws by depriving them of the right of free ingress into the State of Washington and egress therefrom, as well as the right to sue for infringement of copyright in the Federal courts. (*Paul* v. *Virginia*, 8 Wall. 168, 180; *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532; *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, 328.)

In singling out for the condemnation of the Statute, one class of owners of intellectual property (namely owners of copyrighted musical compositions) and exempting all others engaged in exactly the same business the Statute denies equal protection of the laws. (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562.)

The sole object of the Statute is to oppress and discriminate against these appellants in favor of their 528 licensees in the State of Washington. This is a proper subject of judicial inquiry. It results in denying equal protection. (*Dobbins* v. *Los Angeles*, 195 U. S. 223, 240; *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86.)

POINT III.

The Statute on its face is a clear violation of Article I, Section 8, Clause 8 of the Constitution of the United States.

Article I, Section 8, Clause 8 of the Constitution provides that:

> "The Congress shall have power: * * * To promote the progress of science and useful arts, by securing for limited times to authors and inventors, the *exclusive right* to their respective writings and discoveries."

Congress has defined such exclusive rights by granting to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and vend the copyrighted work * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., §1).

Appellants, upon securing their respective copyrights were granted *exclusive* rights which even the United States may not invade. (*United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186, 189; *James* v. *Campbell*, 104 U. S. 356, 358; *United States* v. *Bell Telephone Co.*, 167 U. S. 224, 249-50.)

A fortiori, the State of Washington may not invade these exclusive rights in the manner attempted by the State Statute.

Moreover, Congress has completely covered by legislation the field of copyright and asserted its authority thereover. Consequently, the several states have lost any right that they may have had to legislate in that field. This proposition is so well settled as to need no citation of authority. However, some of the cases of this court are collected in a footnote.[11] Thus the attempt by the State of Washington, through the State Statute, to invade the copyright field and regulate, directly or indirectly, the rights of copyright owners, is nugatory and the statute invalid.

A copyright owner can rely only on the laws of the United States for his remedies. *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 367 (1908). All rights granted by Congress are exclusive. *Lithograph Co.* v. *Sarony*, 111 U. S. 53, 56, 59 (1884); *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 291 (1907); *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188 (1909).

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[11]Congress has enacted a thorough system of recordation, registration and notice with respect to copyrights as shown in footnote "12". It has also defined the rights granted by a copyright in a manner at variance with the State Statute. In other fields similar acts of Congress have been held to bar state legislation on the same subject. *United States* v. *Hill*, 248 U. S. 420; *Jennings* v. *U. S. Fidelity & Guaranty Co.*, 299 U. S. 216; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57. The State Statute purports to define and regulate radio broadcasting in the "public interest". But this Court has already held that that field has been covered by Congress. *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 283.

Among the exclusive rights granted to copyright owners is the right of public performances for profit which includes performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley*, 242 U. S. 591), performances by means of radio broadcasting or re-broadcasting (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191), and by means of a radio receiving set installed in each room of a hotel operated from a master-controlled set (*Society of European S. A. and C., Inc.* v. *New York Statler Hotel, Inc.*, 19 F. Supp 1 [1937, S. D. N. Y.]).

The State Statute deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Federal Copyright Law and Federal Constitution.

This is accomplished by the last proviso of Section 3 of the Statute which prevents copyright owners from restricting the use of their works after a license for a public performance has once been given within or without the State.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc.* v. *Radio Corp. of America*, 88 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226 cert. den. 300 U. S. 681; *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 [D. C. R. I.]).

The several States may not pass laws to the contrary (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 [S. D. Ohio].)

The State Statute ignores the very foundations of the Copyright Law by requiring the following:

(a) Requiring licenses to be issued on a so-called "per piece system of usage" (Sec. 3);

(b) Loss of the right to restrict the use of their copyrighted works after the right to a single use has been sold (Sec. 3);

(c) Filing a list of prices for all appellants' copyrighted works resulting in the granting of involuntary licenses to all users in the State of Washington (Sec. 4);[12]

(d) Compelling appellants to submit to prices fixed by a so-called Anti-Monopoly Board or having all their copyrights confiscated if the prices charged by appellants are greater than those charged in any other State by any group of copyright owners (Secs. 3 and 9);

(e) Compelling appellants to refrain from notifying infringers of their disregard of the Copyright Act, threatening to sue and suing for infringement in the Federal courts (Sec. 7);

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[12]The provision requiring filing of a list purports to be for the purpose of enabling users of music in Washington to avoid innocent infringement. The Copyright Law (Tit. 17, U. S. C.), however, provides all the safeguards against innocent infringement that Congress has deemed necessary or proper. The Copyright Law provides that every copy of the copyrighted work must bear a *notice of copyright;* that *copies must be deposited* in the Office of the Register of Copyrights; that the copyright notice must state the *name of the proprietor* and the *year in which copyright was secured* (17 U. S. C., Secs. 9, 12, 18). *Assignments* of copyrights must be *recorded* with the Register of Copyrights (17 U. S. C., Secs. 42-46). The *Register of Copyrights keeps a full index* of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Secs. 56, 57). The *Record books* of the copyright office are *open to public inspection.* The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

The information required to be filed has no possible relation to any public interest of the State of Washington and its purpose can only be to harass and annoy appellants and to make it so expensive and impossible to comply with the State Statute as to cause appellants to abandon any attempt to enforce and protect their copyrights in the State of Washington.

(f) Compelling appellants to refrain from employing investigators to detect infringement and from licensing broadcasts in other States except at the risk of having all their copyrights given a *situs* in the State of Washington and being compelled to submit to the jurisdiction of the Washington courts and having their copyrights ultimately escheated to such State (Secs. 8 and 9);

(g) Requiring appellants to waive the right to challenge the jurisdiction of the Washington State courts over their persons (Secs. 8, 9 and 10);

(h) Compelling appellants to surrender all their rights under existing contracts with users in the State of Washington by making it a crime to collect monies due thereunder (Secs. 8, 9 and 11).

Unless appellants are willing to surrender all these rights, they are denied the privilege of enjoying the rights granted to them by the United States under their respective copyrights pursuant to the Constitution and the Acts of Congress thereunder.

POINT IV.

The State Statute on its face clearly deprives appellants of their property without due process of law.

The State Statute so defines the phrase "doing business", as to subject appellants to the jurisdiction of the State courts even though they do not transact any business within the State, do not reside there, and have no agent within the State (Secs. 7 and 8). These fictitious definitions of "doing business" are made the basis of jurisdiction *in personam* of appellants so that the State may confiscate their property and subject them to the penalties and forfeitures

of the Statute by reason of acts over which the State of Washington has no possible jurisdiction as a matter of law. (*Chipman Ltd.* v. *Jeffery Co.*, 251 U. S. 373, 379; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Minnesota C. M. Assn.* v. *Benn*, 261 U. S. 140, 145; *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *Bank of America* v. *Whitney Central Nat. Bank*, 261 U. S. 171; *Caledonian Coal Co.* v. *Baker*, 196 U. S. 432, 444.)

Investigation of copyright infringements within the State is made *conclusive* evidence of "doing business" therein (Sec. 8). This ignores the fact that the *Federal* grant of a copyright is nullified unless the copyright owner is permitted to investigate infringements. It would be just as logical to assert that the transportation of merchandise across the borders of a State by an interstate carrier subjects the latter to the jurisdiction of the State courts as one doing business within the State.

Similar fictions are employed in attributing a Washington *situs* to appellants' copyrights regardless of appellants' domicile and residence if appellants shall in any way violate the Statute, or if their copyrighted works are used or sold for public performance *outside* the State, if intended to be heard within the State from a point outside the State. It is well known that all radio programs from adjoining States, and even from distant States and from Canada, and on short-wave from foreign countries are intended to be heard within the State of Washington.

The excuse for giving such copyrights a Washington *situs* is indeed thin and transparent. It is an attempt to render the enjoyment of a federal right impossible by arbitrarily creating a fictitious legal *situs* incompatible with the existence of the right. (*Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, 331.)

The State Statute by creating these arbitrary conclusive presumptions and fictitious definitions, deprives appellants of the right to show that they are not in fact doing business in the State of Washington; that their copyrights actually have no *situs* in the State, and that they have not so acted as to give the courts of Washington any express or implied consent to adjudicate their property rights. In denying appellants a fair opportunity to establish the true facts, the Statute violates due process. (*Manley* v. *Georgia*, 279 U. S. 1, 6; *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Morrison* v. *California*, 291 U. S. 82, 90.)

The indefiniteness of the Statute in view of its drastic penalties, likewise results in denying due process. (*Connally* v. *General Const. Co.*, 269 U. S. 385, 391, 393-5; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233.)

POINT V.

The Statute impairs obligations under existing contracts.

The State Statute destroys all of the 528 contracts now existing between the appellant Society (representing all its composer, author and publisher members jointly) and users located in the State of Washington. It imposes the criminal penalties of the Statute upon any licensee who continues to respect the obligations under the existing blanket licenses, as well as upon appellants if they attempt to enforce such contract.

This is accomplished by the provision in Section 8 that "all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedi-

ence herewith; and the acceptance of the general privileges of the State of Washington by * * * any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time" is deemed equivalent to an appointment by the non-resident copyright owner of the Secretary of State as his agent for service of process against such non-resident growing out of any violation of the Act (R. 64-5).

Appellants' 528 licensees are all located in the State of Washington. All of them obviously are exercising the privileges of citizens of that State since they reside there. Unless those 528 licensees all *forthwith* indicate their obedience to the Statute, that is, unless they forthwith repudiate the blanket licenses heretofore issued to them by appellants, appellants become subject to all the provisions and penalties of the Statute in actions brought in the State Courts on substituted service.

It is for that reason that appellants have been compelled to desist from enforcing their contracts and to cease all activities in the State of Washington since the enactment of this Statute (R. 27-8).

Since such licensees are defined as "aiders" or "abettors", they also come within the penal provisions of the Statute, and if they should continue to discharge their respective obligations to appellants under existing contracts they will each be subjected to a fine of $500 or imprisonment for six months, or both.

The contracts between the Society and users in Washington, and between the Society and its members were valid when made, and cannot now be declared illegal; nor can the obligations thereunder be altered by legislative fiat.

The Constitution of the United States provides (Art. I, §10):

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

It is obvious that the purpose of destroying existing contracts is to benefit the other parties to those contracts at appellants' expense. There is no public interest or public necessity involved.

In *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), this Court invalidated an Arkansas statute which impaired the security of bondholders under the guise of "public interest". This Court there said at page 62:

> "*What controls our judgment at such times is the underlying reality rather than the form or label.* The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." (Italics ours.)

POINT VI.

The State Statute interferes with treaties between the United States and foreign countries respecting copyrights and with proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

Section 8 of the Copyright Law (35 Stat. L. 1075) provides as follows as to recognition of copyrights by citizens and subjects of foreign States:

> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.
>
> "The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

Pursuant to this provision a number of treaties have been entered into between the United States and foreign countries and there have been 62 Presidential proclamations establishing reciprocity between the United States and foreign countries. (See Copyright Office Bull. #14, pp. 39-54-h.)

Such reciprocity has been established on the basis of copyright laws as enacted by Congress. If each of the States may modify those laws the basis upon which these treaties have been entered into and the proclamations issued will be entirely destroyed.

The Society has reciprocal agreements with similar societies existing in practically every civilized foreign country of the world. These agreements are made pursuant to the treaties and proclamations mentioned above. Since the State Statutes nullifies these contracts it interferes with rights protected by treaties which are the supreme law of the land.

POINT VII.

In all other District Courts in which applications for interlocutory injunction were made to restrain enforcement of similar statutes, such injunctions were granted and the Courts held the allegations of the respective complaints sufficient to confer jurisdiction.

Similar statutes were enacted in Montana on March 12, 1937 (Ch. 90, Laws, Montana, 1937); in Nebraska on May 17, 1937 (Neb. Sess. Laws, 1937, p. 488); in Tennessee, May 21, 1937 (Ch. 212, Laws, Tennessee, 1937); in Florida on June 9, 1937 (1 Gen. Laws, Fla., 1937, p. 204).

Interlocutory injunctions have been entered restraining enforcement of the last three statutes, the complaints in each case containing allegations substantially identical to those at bar. *Buck* v. *Swanson* (Unreported, D. C. Neb., Docket #Eq. 562, *per curiam* opinion by Hons. ARCHIBALD K. GARDNER, C. J., THOMAS C. MUNGER, D. J., and JAMES A. DONOHOE, D. J., Nov. 13, 1937); *Buck* v. *Keaton* (Unreported, Middle Dist. Tenn., Docket #Eq. 728, interlocutory

decree entered by Hons. XENOPHON HICKS, C. J., JOHN J. GORE, D. J., and GEORGE C. TAYLOR, D. J., Dec. 1, 1938); *Buck* v. *Landis* (Unreported, N. D. Fla., Gainesville Div., Docket #Eq. 12, *per curiam* opinion by Hons. RUFUS E. FOSTER, C. J., A. V. LONG, D. J., and LOUIE W. STRUM, D. J., April 5, 1938, appeal pending in this Court, Docket #276).

The decrees in *Buck* v. *Swanson, supra,* and *Buck* v. *Keaton, supra,* were substantially the same as that printed at pages 270-271 of the record in *Gibbs* v. *Buck* (No. 276, October Term, 1938).

A motion for interlocutory injunction to restrain enforcement of the Montana Statute was argued in the Montana District Court before Hons. BERT E. HANEY, C. J., JAMES H. BALDWIN, D. J., and CHARLES N. PRAY, D. J., on April 23, 1937 (*Carl Fischer, Inc.* v. *Shannon*, D. C. Mont., Helena Div. #1537), but no decision has yet been rendered.

Thus, the *three Circuit Judges and six District Judges, who have already passed upon all the questions here involved, have unanimously held with appellants.* The court below refused to pass on the merits. The Montana District Court (Judge HANEY sat in both the Montana Court and the court below) has held its decision in abeyance for the past 20 months.

CONCLUSION.

The order and decree appealed from should be reversed.

Respectfully submitted,

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HERMAN FINKELSTEIN,
Counsel for Appellants.

December, 1938.

APPENDIX.

The Washington State Statute.

Chapter 218, Washington Laws, 1937, page 1070, reads as follows:

AN ACT in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Washington; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents, prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690, of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

SEC. 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

SEC. 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however*, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further*, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further*, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected

by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

SEC. 4. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic, shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any

time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

SEC. 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

SEC. 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however*, Any individual owner of a copyrighted

work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

SEC. 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration

thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

SEC. 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine,

is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident

or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided*, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further*, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups or entity, a reasonable opportunity to defend the action: *Provided, further*, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

SEC. 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-

resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state,

and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: *Provided,* Any sums paid on licenses violating this act shall ~~only~~ be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: *Provided further,* In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and

said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopilies and price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue

to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however*, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the

court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund. *Provided, further*, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

SEC. 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such

special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however*, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or nonresident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

SEC. 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

SEC. 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

SEC. 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.